

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.2162 OF 2020
IN SA/50/1993

SHAIKH HAMID S/O SHAIKH SANDU AND ORS
VS.
SHAIKH ISMAIL S/O SK JAMAL DIED THR. LRS SHAIKH KHALIL
SHAIKH ISMAIL AND ORS

WITH
CIVIL APPLICATION NO.2158 OF 2020
IN SA/50/1993

SHAIKH MAHEMOOD S/O SHAIKH SANDU DIED THR LRS. SHAIKH
RAFIK S/O SHAIKH MAHEMOOD AND ORS
VERSUS
SHAIKH ISMAIL S/O SK. JAMAL DIED THR. LRS. SHAIKH KHALIL
SHAIKH ISMAIL AND ORS

...
Mr. Shaikh Mujtaba Gulam Mustafa, Advocate for applicants.
Mr. S. R. Deshpande, Advocate for respondent Nos.2 and 3.
...

CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 04.08.2021
Pronounced on : 07.09.2021

ORDER :-

. The second appeal was admitted on 27.04.1993 and since then it was pending for final hearing. It also appears that on certain occasions, the matter was on board, however, it was got adjourned or sometimes as the legal representatives of some of the respondents were to be brought on record it was on board, however, final hearing could not take place.

It was then noticed that the learned Advocate who was appearing for the appellants had expired and, therefore, this Court on the Court motion issued notice to the appellants. Those notices were served on the appellants and the office remark dated 06.07.2012 indicated that all the appellants were served, however, when none of the appellants appeared and made arrangement to engage another Advocate, ultimately one chance was given by order dated 11.12.2017 by keeping the matter for dismissal on 15.12.2017. On 15.12.2017, none appeared for the appellants and, therefore, the second appeal was dismissed in default.

2. Civil Application No.2162 of 2020 has been filed for condoning the delay of 758 days in filing application for restoration of second appeal and for recalling of the order passed by this Court on 15.12.2017 and restoration of second appeal. Further, Civil Application No.2158 of 2020 has been filed for getting the delay of 2566 days condoned in bringing the legal representatives of deceased appellant No.1 on record.

3. Heard learned Advocate Mr. Shaikh Mujtaba Gulam Mustafa for appellants and learned Advocate Mr. S. R. Deshpande for respondent Nos.2 and 3.

4. Both the civil applications have bearing upon each other. Unless the legal representatives of appellant No.1 are brought on record the

appeal cannot be restored or *vice-versa* it can be said that unless the second appeal is restored, legal representatives of appellant No.1 cannot be brought on record. Hence, they are disposed of by this common order.

5. In Civil Application No.2158 of 2020, which is for getting the delay of 2566 days condoned in bringing legal representatives of appellant No.1 on record, it has been contended that appellant No.1 Shaikh Mahemood s/o Shaikh Sandu expired on 03.11.2012. The death certificate issued by Aurangabad Municipal Corporation dated 02.01.2013 has been produced on record. It has been contended that the other appellants were served with the notice issued by this Court, however, said appellant No.1 Shaikh Mahemood was suffering from severe paralytic attack and was bedridden since long. It is also then stated that only after applicant No.1 - Shaikh Rafik s/o Shaikh Mahmood made inquiry about the matter, he came to know that the matter has been dismissed. He, therefore, applied for the certified copies of the said order which he had received on 31.01.2020 and then he filed the applications. According to the applicants, deceased – original appellant was looking after the matters and, therefore, the legal representatives of the deceased appellant No.1 were not aware about the proceedings in second appeal. Even the Court notice was served on

the deceased appellant No.1 in the past. Since he expired, the family members could not know about the same and they were under mental shock. The legal representatives being illiterate were not aware about the requirements of law. They prayed for condonation of delay of 2566 days and prayed for allowing the legal representatives of appellant No.1 to be brought on record. For the same reasons, the appellant state in Civil Application No.2162 of 2020 that the delay has been caused and the matter needs to be restored after recalling of order passed by this Court on 15.12.2017. In addition to that it is stated that appellant No.2 is illiterate, old age and weak memory person. The legal representatives of appellant Nos.2 and 3 are also illiterate. Only after applicant No.1 in this application inquired about the matter, he came to know about the dismissal.

6. At the outset, it is to be noted that the learned Advocate who was representing the appellants had expired prior to 06.07.2012 and, therefore, notices were issued to the appellants. They were served on or around 06.07.2012 and in spite of service of notice in which it was indicated that since their Advocate is expired, the next date in the matter was informed and asked them to remain present before the Court along with their Advocate. If such clear notice was given to the appellants and even at that time, original appellant No.1 - Shaikh

Mahemood was alive, they had not made any kind of arrangements to engage another Advocate. Shaikh Mahemood expired four months thereafter. It is stated in the application that he had suffered severe paralytic attack. Even if we accept the said fact, no medical certificate has been produced nor any other documents regarding treatment given to Shaikh Mahemood has been produced, yet, the fact remains that he could have definitely asked the other appellants to engage some other Advocate. Appellants have not come with the case that original appellant No.1 – Shaikh Mahemood had lost his speaking capacity in the paralytic attack. The further acts of searching Advocate and handing over the brief could have been done by appellant No.2. It has been tried to be contended that the original appellant No.1 – Shaikh Mahemood could have been suffering from paralytic attack since long. Now, here the date on which he suffered the attack or atleast approximate month and year has not been stated. The fact of death of Shaikh Mahemood was definitely within the knowledge of the other appellants. Even at that time, those remaining appellants could have asked the sons of Shaikh Mahemood to make arrangements to engage Advocate in the Second Appeal. It has been now conveniently stated that appellant No.2 is having weak memory. No documents regarding his ill health have been produced on record. Illiteracy appears to be the common ground.

7. Even after receipt of the notice from this Court, the appellants did not appear and this Court waited for about five years to dispose of the matter. On any earlier occasion, how applicant No.1 in Civil Application No.2158 of 2020 did not consider that he should make inquiry about the appeal, is a question. The applicants are the original plaintiffs, who had filed suit for redemption of mortgage and recovery of possession of agricultural land. Their suit was dismissed. The appellate Court had dismissed the appeal. In spite of the fact that the claim was made for redemption of mortgage and recovery of possession, how the appellants could keep quiet for so many years and failed to make inquiry about the progress in the second appeal is questionable. Applicants then contend that all of a sudden applicant No.1 is stated to have made inquiry about the litigation just prior to the application. The same inquiry could have been made by him much earlier point of time. Therefore, the fact of recent inquiry by applicant No.1 appears to be not a real fact. Though the second appeal is admitted in the past, yet, for such negligent acts on the part of the applicants, applications are required to be dismissed.

8. In the past also, it appears that second appeal was dismissed. By order dated 16.01.2009, after condoning the delay of 225 days in filing application for restoration, this Court had restored the second appeal subject to deposit of cost of Rs.1,000/-. Therefore, whatever possible

things could have been done were done by this Court, yet, the applicants were negligent. Now, they do not deserve any sympathy. The respondents have already suffered and, therefore, both the applications stand rejected.

[SMT. VIBHA KANKANWADI, J.]

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